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No. 97-715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can state criminal procedure statutes create "liberty interests" protected by the Fourteenth Amendment?

2. After *Sandin* v. *Conner*, 515 U. S. 472 (1995) is the use of "mandatory language" in a state statute still relevant to the definition of a "liberty interest" outside the prison context?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's creation of a federally protected liberty interest in post-booking phone calls creates one more source of

expensive litigation against law enforcement agencies, diminishing the resources available for protection of the public. This addition to the numerous rights the arrestee already holds is contrary to the rights of victims and society which CJLF was formed to advance.

November, 1997

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Around midnight on March 9, 1991, Mary Ann Carlo was arrested for driving under the influence in San Bernardino County.[1] *Carlo* v. *City of Chino*, 105 F. 3d 493, 495 (CA9 1997). She was held overnight, and several times during the night she asked to use a telephone. *Ibid.* Hector Guerra, the watch commander on duty that night, denied these requests. *Ibid.* She was allowed to make a phone call at 2:00 p.m., 14 hours after her arrest. *Ibid.*

Carlo filed an action under 42 U. S. C. § 1983 claiming that her civil rights were violated when Officer Guerra denied her the opportunity to make a phone call, as required by California Penal Code § 851.5. *Ibid.* Section 851.5 requires that

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

"[i]mmediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls." Cal. Penal Code § 851.5(a). Carlo claimed that this deprivation of her state right violated the Due Process Clause. 105 F. 3d, at 495. In the District Court, a jury found Carlo had been denied a constitutional right and awarded her nominal damages. *Ibid.* On defendant's motion for judgment as a matter of law, the district judge overturned the jury's verdict, concluding that Carlo did not have a substantive due process right to make a telephone call. *Id.*, at 495-496.

The Court of Appeals, reviewing de novo, abandoned the substantive due process approach and proceeded under a procedural due process analysis. *Ibid.* Unable to ascertain the applicability of *Sandin* v. *Conner*, 515 U. S. 472 (1995) in the pretrial detainee context,[2] the Court of Appeals opted to evaluate whether Carlo had a protected liberty interest both by applying the *Sandin* "atypical, significant hardship" analysis and by looking for mandatory language within the Penal Code as required by *Hewitt* v. *Helms*, 459 U. S. 460, 471-72 (1983).[3]

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2. The court noted that in *Mitchell* v. *Dupnik*, 75 F. 3d 517, 523 (CA9 1996) the Ninth Circuit concluded that *Sandin*'s " 'rationale regarding incarcerated prisoners is not applicable to pretrial detainees,' " *Carlo*, 105 F. 3d, at 499, n. 1, leaving "unanswered the question . . . of what test to apply in the remainder of the pretrial-detainee, state created right cases." *Ibid.* The court also recognized other circuit court cases concluding or implying that *Sandin* does not apply to pretrial detainees. *Id.*, at 499. As the petition for certiorari points out, these cases are in conflict with *Watson* v. *City of New York*, 92 F. 3d 31, 37 (CA2 1996) and *Muslim* v. *Frame*, 897 F. Supp. 215, 234 (ED Penn. 1995), each recognizing in the pretrial detainee setting that the *Hewitt* methodology was abandoned in *Sandin*. See Pet. for Cert. 20-21.

3. To avoid ruling on *Sandin*'s applicability, lower courts will often apply both *Sandin*'s "atypical, significant hardship" analysis and *Hewitt*'s mandatory language test, leaving the question unresolved. For example, in *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178 (CA6 1997), cert. granted, 138 L. Ed. 2d 1011, 117 S. Ct. 2507 (1997), the court questioned "whether the [*Sandin*] Court intended to eliminate the mandatory/discretionary distinction altogether, looking to the alternate means of protecting 'atypical and significant'

Carlo, 105 F. 3d, at 499-500. The Court of Appeals concluded that "under either standard the California statute creates a protected liberty interest." *Id.*, at 499. In conclusion, the Court of Appeals held "that by violating the California statute Guerra violated Carlo's constitutional rights." *Id.*, at 500.

SUMMARY OF ARGUMENT

In the present case, the Ninth Circuit was asked to address the question of whether a state statute, conferring a right to a post-booking phone call, could create a liberty interest protected by the Fourteenth Amendment. The court's answer to this question conflicts with other circuit court opinions and illuminates the confusion surrounding this Court's holding in *Sandin* v. *Conner*, 515 U. S. 472 (1995).

Resolution of the conflicts between the circuits requires this Court to address an important federal question: Can state criminal procedure statutes create liberty interests protected by the Fourteenth Amendment? This question goes to the heart of the due process analysis, and, as the *Harrill*, *Watson*, and *Carlo* opinions illustrate, the lower courts need direction in answering this question.

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hardships under state law [citation omitted], or whether the Court simply intended to set up a further requirement for forming state-law liberty interests, making mandatory language in state procedures a necessary but no longer sufficient condition in finding such interests." *Id.*, at 1185. The Sixth Circuit avoided the resolution of this issue, concluding that under either of the interpretations Woodard would not prevail on his claim. *Id.*, at 1186.

Courts have also found "it more prudent not to rule on the *Sandin* issue directly" and have chosen to resolve matters presented on other grounds. *Campo* v. *Keane*, 913 F. Supp. 814, 821 (SDNY 1996); see also *Bedoya* v. *Coughlin*, 91 F. 3d 349, 352 (CA2 1996); *Rodriguez* v. *Phillips*, 66 F. 3d 470, 480 (CA2 1995); *Moore* v. *Selsky*, 900 F. Supp. 670, 673 (SDNY 1995). This indecision reflects an uncertainty in the law which only this Court can resolve. See part III, *infra*, at 9-11.

Further, the confusion as to the scope and effect that should be given to the *Sandin* opinion is apparent among the lower courts. The extent to which *Sandin* abandoned the mandatory language test needs to be explained. The anomalous effect the *Sandin* opinion has in the parole context needs to be rectified by the Court. Only this Court can resolve the conflict between *Sandin*'s abandonment of the *Hewitt* v. *Helms* methodology and earlier, not yet overruled Supreme Court precedents employing that methodology. The Court should grant the writ of certiorari to resolve these issues.

ARGUMENT

I. The Ninth Circuit's opinion conflicts with other courts of appeals on the creation of "liberty interests" by state criminal procedure statutes.

A. Harrill v. Blount County.

The Ninth Circuit decided this important federal question in a manner that conflicts with the approach taken by the Sixth Circuit in *Harrill* v. *Blount County*, 55 F. 3d 1123 (1995). The *Harrill* opinion is almost identical factually to the present case. Debra Harrill was arrested "for concealing stolen property by driving a stolen vehicle." *Id.*, at 1124-1125. She was prevented from making an immediate phone call to her father. *Id.*, at 1125. Like California, Tennessee has a statute that confers a right to a telephone call to arrestees after booking. *Ibid.* The statute states in relevant part:

> "No Person under arrest . . . shall have his name entered on any . . . record until such time that the person has successfully completed a telephone call to an attorney, relative, minister or any other person that he shall choose, without undue delay. One (1) hour shall constitute a reasonable time without undue delay. However, if the arrested person does not choose to make a telephone call, then he shall be 'booked' or docketed immediately." Tenn. Code Ann. § 40-7-106(b).

Plaintiff Harrill argued, to advance her § 1983 claim, that the statute created a right protected by the Due Process Clause. *Harrill*, 55 F. 3d, at 1125. The Sixth Circuit did not agree. *Ibid.* The court explained that the "right to make a phone call immediately upon arrest is not a recognized property right, nor is it a traditional liberty interest recognized by federal law" and concluded that a "violation of a right created and recognized only under state law is not actionable under § 1983." *Ibid.* This conflicts with the Ninth Circuit's reliance on a similar state law to create a federally protected right for arrestees.

B. Watson v. City of New York.

The Court of Appeals' recognition of a liberty interest stemming from Penal Code § 851.5 also conflicts with the approach taken by *Watson* v. *City of New York*, 92 F. 3d 31 (CA2 1996). In *Watson*, the plaintiff claimed that her due process rights were violated when the state failed to arraign her within 24 hours of her arrest. *Id.*, at 34. Watson was arraigned approximately 36 hours after her arrest. *Ibid.* This was well within the federal 48-hour limit set by *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56 (1991). The plaintiff relied on § 140.20(1) of the New York Criminal Procedure Law to advance her claim. *Watson*, 92 F. 3d, at 35. This section, as interpreted in *People ex rel. Maxian ex rel. Roundtree* v. *Brown*, 77 N. Y. 422, 570 N. E. 2d 223 (1991) (*per curiam*), finds a "delay in arraignment of more than twenty-four hours . . . presumptively 'unnecessary . . . .' " *Watson*, 92 F. 3d, at 35. Accordingly, Watson argued that by enacting the statute, " 'New York created a federally protected liberty interest in being released, or at least arraigned, within 24 hours.' " *Id.*, at 37. The court found the plaintiff's reliance on a state criminal procedure rule "fundamentally flawed . . . ." *Ibid.* The court recognized that there is "[a]mple precedent" that establishes that rules of criminal procedure cannot create liberty interests. *Id.*, at 37-38. The court cited *Olim* v. *Wakinekona*, 461 U. S. 238, 250 (1983) for the proposition that " '[p]rocess in not an end in itself' " and its "constitutional purpose is to protect a substan-

tive interest to which the individual has a legitimate claim of entitlement." *Watson*, 92 F.3d, at 38.

Watson recognizes that the "liberty interest" in most pretrial detention cases is "liberty" in its core sense of freedom from the physical restraint of incarceration. The imprisonment of people who have not yet been convicted of any crime is a sensitive area, involving both important considerations of public safety, see, *e.g.*, *United States* v. *Salerno*, 481 U. S. 739, 755 (1987), and great potential for injustice. For this reason, pretrial arrest and detention is surrounded by a host of protections, state and federal, constitutional and statutory. Foremost of these is the Fourth Amendment, with its requirements for probable cause for arrest, *Gerstein* v. *Pugh*, 420 U. S. 103, 111 (1975), warrants in some cases, see *Payton* v. *New York*, 445 U. S. 573, 603 (1980), and a hearing before a neutral magistrate within 48 hours. *County of Riverside* v. *McLaughlin*, *supra*, 500 U. S., at 56. The common law writ of habeas corpus, guaranteed in the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, and cognate state provisions, see, *e.g.*, Cal. Const., Art. I, § 11, was primarily a pretrial remedy. See *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 839, 116 S. Ct. 2333, 2340 (1996). It remains available for that purpose to this day, when other remedies fail. See *Watson*, *supra*, 92 F. 3d, at 34, n. 2 (citing *People ex rel. Maxian ex rel. Roundtree* v. *Brown*, 77 N. Y. 422, 426-427, 570 N. E. 2d 223, 224-225 (1991) (*per curiam*)). State statutes, such as those at issue in this case, *Watson*, and *Harrill* provide further protections.

These protections, *Watson* noted, are not ends in themselves but devices for setting free people who have been wrongly jailed. The purpose of the statutory right to a phone call is to contact a lawyer, or someone who can arrange for a lawyer, who can then set in motion the procedures to obtain the arrestee's release, whether unconditionally, on own recognizance, or on bail. The phone call is not a "liberty interest" in itself. Similarly, the *Watson* court concluded, "Arraignment, however, is a *procedure* that protects the true liberty interest at stake in this

case—freedom from confinement." 92 F. 3d, at 38 (emphasis in original).

Watson and the Court of Appeals' opinion in the present case are thus in square conflict over the question of whether state criminal procedure statutes create liberty interests independently enforceable in § 1983 actions, or whether they merely provide additional protections of the underlying right to liberty, beyond those constitutionally required, without creating any new liberty interests. The question is undeniably of great importance, given the tens of millions of arrests that occur in America each year. See U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1995, p. 394 (1996) (14,648,700 arrests in 1994). This case therefore presents a split among the circuits on an important question, warranting this Court's review. See Supreme Court Rule 10(a).

II. The evident confusion among the lower courts regarding the mandatory language test calls for clarification and guidance from this Court.

The Ninth Circuit's use of the mandatory language test for pretrial detainees conflicts with *Sandin* v. *Conner*, 515 U. S. 472 (1995). In *Sandin*, the Court explained that it "believe[s] that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Id.*, at 483. The Court then called for a "return to the due process principles . . . correctly established and applied in *Wolff* and *Meachum*." *Ibid.* After *Sandin*, it would seem that parsing state statutes and regulations would no longer be the focus of the liberty interest determination. However, as the Ninth Circuit opinion illustrates, the abandonment of the mandatory language test in its entirety has been slow in the federal courts. This continued use of the mandatory language test conflicts with the *Sandin* opinion as well as those circuit and district court opinions that follow *Sandin*'s instruction. This conflict requires clarification from this Court on *Sandin*'s

effect on the continued applicability of the mandatory language test in the procedural due process analysis.

The conflict among the circuit courts as to this important federal question is illustrated by the divergent perspectives of *Sandin*'s abandonment of the *Hewitt* methodology. Within the prisoner context, courts recognize that "*Sandin* expressly overruled the *Hewitt* methodology" and apply the "atypical and significant" hardship test. See, *e.g.*, *Mackey* v. *Dyke*, 111 F. 3d 460, 462 (CA6 1997). However, outside the prisoner context, recognition of *Sandin*'s abandonment of the mandatory language test varies.

In the pretrial detainee context, as Guerra's petition requesting certiorari points out, there are at least three different courts which conclude the mandatory language test is still viable after *Sandin*, and still others have implied its viability in dicta. See Pet. for Cert. 22-23; see also *Mallatte* v. *Arlington County Employees' Supplemental Retirement System II*, 91 F. 3d 630, 636, n. 3 (CA4 1996) (suggesting that *Sandin* is limited to prisoner cases). This conclusion is in conflict with *Watson* v. *City of New York*, 92 F. 3d 31, 37 (CA2 1996).

In *Watson*, the court was asked to determine whether New York Criminal Procedure Law, Section 140.20(1) created a liberty interest in being arraigned or released within 24 hours. *Ibid.* The plaintiff relied on the *Hewitt* methodology to advance this argument. *Ibid.* The Court of Appeals rejected the argument explaining that the "analysis in *Hewitt* . . . was repudiated by the Supreme Court in *Sandin v. Conner* . . . ." *Ibid.* *Watson* thus rejects the notion that *Sandin* is limited to prison discipline cases and rejects the application of the mandatory language test in the pretrial detainee context.

Outside the context of pretrial detainees, courts have also distinguished *Sandin* in order to apply the mandatory language requirements advanced by *Hewitt*. See, *e.g.*, *Moorman* v. *Thalacker*, 83 F. 3d 970 (CA8 1996). In *Moorman*, the court applied the *Sandin* "atypical, significant hardship" test to Moorman's claim involving disciplinary confinement and

concluded that the disciplinary confinement complained of was within the same category as *Sandin*. See *id.*, at 972-973. However, the court's analysis deviated when the court turned to Moorman's second claim involving the loss of good-time credits. *Id.*, at 973.

Instead of looking at the deprivation complained of and determining whether it was "atypical" and "significant," warranting due process protections, the court determined that the state had to have "a mandatory scheme which necessarily affects the duration of a prisoner's sentence" in order for good-time credits to be considered a liberty interest. *Ibid.* Relying on *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974) to support this analysis, the court proceeded to search for mandatory language within the Iowa statutes dealing with good-time credits. *Moorman*, 83 F. 3d, at 973. The failure to apply *Sandin* to the liberty interest analysis for good-time credits, while in accord with the decision in the present case, provides further illustration of the Court of Appeals' departure from Supreme Court precedent and the need for further guidance on this point.

III. The anomolous result created by the pre-*Sandin* precedents can only be resolved by this Court.

Between *Sandin* v. *Conner*, 515 U. S. 472 (1995) and unreversed, pre-*Sandin* precedents, there is an anomaly in the law that only this Court can resolve. *Ellis* v. *District of Columbia*, 84 F. 3d 1413, 1418 (CADC 1996) held that "[u]ntil the [Supreme] Court instructs . . . otherwise," courts are forced to follow Supreme Court precedents on point, even if these precedents are based on the *Hewitt* methodology rejected in *Sandin*.

In *Ellis*, prisoners brought a class action suit under 42 U. S. C. § 1983 claiming that they had a due process liberty interest in parole. 84 F. 3d, at 1414-1415. This claim was based on a point system implemented in the District of Columbia for determining parole eligibility. *Id.*, at 1415-1416. The

District Court, basing its decision on the mandatory language in the statutes creating the point system, "held that inmates with low total point scores had an 'expectation of release' and thus a liberty interest in parole." *Id.*, at 1417. The Court of Appeals recognized that at the time of the District Court's ruling, the proper approach to the Due Process Clause relied on the language of the parole regulation. *Ibid.*

The Court of Appeals realized that the *Sandin* opinion may have altered this conclusion and reviewed the precedent in this area of the law. *Id.*, at 1417-1418. The court noted that *Sandin* abandoned the mandatory/discretionary dichotomy. *Id.*, at 1418. But the *Ellis* Court also recognized that *Sandin* did not expressly overrule any Supreme Court precedent using this dichotomy. *Ibid.* This left the court at bay as to what authority controlled. Explaining that the *Sandin* test "seems ill-fitted to parole eligibility determinations," the court turned to *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979) and *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987) for guidance. *Ellis*, 84 F. 3d, at 1418. The court determined that these cases were directly on point. *Ibid.* *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989) instructs lower courts to use the precedent directly on point even when it is based on methodology abandoned in subsequent opinions of the Court. 84 F. 3d, at 1418. Accordingly, the court concluded *Greenholtz* and *Allen* controlled. *Ibid.* The Court of Appeals, realizing that only this Court has the authority to alter this course, returned "to the language of the regulations" to guide its determination. *Ibid.*

Other courts have also recognized the split in authority created by the *Sandin* decision. In *Watson* v. *DiSabato*, 933 F. Supp. 390, 393 (DNJ 1996), the court agreed with the *Ellis* reasoning, conceding "the uncertain status of *Greenholtz* and *Allen*" after the *Sandin* decision. See also *Wilson* v. *Kelkhoff*,

86 F. 3d 1438, 1446, n. 9 (CA7 1996) (suggesting that the Court intended to leave the parole precedent "undisturbed").[4]

Only this Court can resolve the conflict between *Sandin*'s abandonment of the *Hewitt* methodology and the lower courts' obligation to follow unreversed precedents on point. Accordingly, this Court should grant the writ of certiorari to clarify the scope of the *Sandin* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

November, 1997

Respectfully submitted,

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4. Further, in *Harper* v. *Young*, 64 F. 3d 563, 564-565 (CA10 1995) the court avoided addressing *Sandin*'s effect on pre-*Sandin* authority by analogizing to parole. *Barnett* v. *Moon*, 852 P. 2d 161, 162-163 (Okla. Crim. App. 1993) had implied that prisoners had a liberty interest in participation in Oklahoma's pre-parole supervision program. Instead of determining whether *Barnett* survived *Sandin*'s reforms, the court held that since "program participation is sufficiently similar to parole," participation in the program is protected by the Due Process Clause itself. 64 F. 3d, at 565. Addressing *Sandin*'s effect, the court explained, would be a task of "no small difficulty." *Ibid.* This Court also avoided addressing *Sandin*'s effect by resolving the case on the "narrow question" presented by the petitioner: "whether a program employed by the state of Oklahoma to reduce the overcrowding of its prisons was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972)." *Young* v. *Harper*, 520 U. S. ___, 137 L. Ed. 2d 270, 275, 117 S. Ct. 1148, 1150 (1997).